UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
LYNDA KAY STARR,	)	CASE NO. 99-30801 HCD
	)	CHAPTER 13
	)	
DEBTOR.	)	

Appearances:

Loraine P. Troyer, Esq., attorney for debtor,121 North Third Street, Goshen, Indiana 46526; and

Debra L. Miller, Esq., Standing Chapter 13 Trustee, P.O. Box 11550, South Bend, Indiana 46634.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 28, 2005.

Before the court, at the end of this chapter 13 bankruptcy case, are the Trustee's Motion to Dismiss for Failure to Make Payments and to Properly Fund the Confirmed Plan, filed by the Chapter 13 Trustee Debra L. Miller ("Trustee") on October 6, 2004, and the Motion for Discharge filed by the debtor Lynda Kay Starr ("debtor") on October 7, 2004. A hearing on both motions was held on December 16, 2004. The court directed the parties to file simultaneous briefs on the matters. When the briefing period expired on January 13, 2005, the court took the motions under advisement.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2) (A) and (O) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The underlying facts are undisputed. The debtor filed a chapter 13 petition on March 8, 1999, and filed her Plan the same day. The Plan provided that the debtor would pay the Standing Chapter 13 Trustee $731.25 each month for 48 months. It established payment priorities: Allowed unsecured claims (Class 4) would receive a pro rata dividend of funds after payment of administrative expenses, priority claims and secured claims. Under the § 1322(d) analysis, Class Four unsecured creditors would receive $9,601. The Plan also stated that the $9,601 dividend payable to those unsecured creditors was equal to the amount that would be distributed to unsecured creditors if a Chapter 7 Trustee were to liquidate non-exempt assets. *See* R. 121, Ex. A, Chapter 13 Plan. The Plan was served upon all creditors and parties in interest listed on the matrix.

The debtor's Plan was confirmed on June 10, 1999, pursuant to a Special Order Confirming Chapter 13 Plan that modified the Plan. It adjusted the treatment of several secured and priority claimants by increasing their payments.[1] It also extended the length of the Plan beyond 48 months; it required the debtor to pay to the Trustee $731.25 a month until the Plan, as modified, was liquidated. The Order made no changes to the treatment of the unsecured creditors as it was spelled out in the Plan. The court found that the modified Plan complied with all the requirements of 11 U.S.C. § 1325 and therefore was confirmable. The Special Order was served on the U.S. Trustee, the Standing Chapter 13 Trustee, the debtor's attorney, and the attorneys for KeyBank and for First Chicago NBD Mortgage Company.

[1] The Special Order provided that First Chicago NBD Mortgage Company would be paid pre-petition mortgage arrearages; the Elkhart County Treasurer would retain its lien for real estate taxes and its secured claim would be paid from the escrow funds held by First Chicago NBD Mortgage Company; and the secured claims of Sears, KeyBank, Indiana Department of Revenue, and Internal Revenue Service would be paid. *See* R. 121, Ex. B.

On October 6, 2004, the Trustee filed a Motion to Dismiss the debtor's bankruptcy on the ground that the Plan failed to comply with 11 U.S.C. § 1322 and the terms of the confirmed Plan.[2] *See* R. 107. Because the Plan already was in its 67th month, was underfunded, and would require an additional 20 months to complete, the Trustee asserted, she asked that the bankruptcy be dismissed without prejudice. *See id.*

The debtor objected to the Trustee's dismissal motion on October 7, 2004. *See* R. 108. She pointed out that, at the time the Plan was filed, the debtor offered her best estimate of the amount of secured and priority claims and estimated that a dividend of $9,601 could be divided among the general unsecured claims. However, the Plan stated that the Trustee should pay the claims as filed, not as estimated. The Plan was modified by Special Order, and as a result the secured and priority claims increased significantly over the amounts given in the Plan. As the debtor demonstrated (by setting forth § 1325 and § 1322(d) analyses that compared the values of assets and liabilities under the Plan and under the Special Order), the dollars to be distributed to unsecured creditors decreased from $9,601.00 to $1,019.41. *See id.* at 2. The debtor stated that she had paid the unsecured creditors $2,642.31. She therefore had completed her Plan, as modified, she said, and did not deserve dismissal.

On October 7, 2004, the debtor also filed a Motion for Discharge. *See* R. 109. She claimed that all secured and priority claims and all legal fees were paid in full. She further stated that the general unsecured creditors, who were entitled to a pro rata share of $1,019.41, had been paid $2,642.31, according to the Trustee's online records. For that reason, the debtor asserted that she had completed all her payments under the Plan and was entitled to a discharge under 11 U.S.C. § 1328.

The Trustee objected to the debtor's discharge motion. She stated that the unsecured creditors expected, under the debtor's confirmed Plan, to receive not less than a $9,601 dividend, to be paid pro rata, but

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[2] In her Motion to Dismiss, the Trustee asserted that the debtor was delinquent in her payments to the estate and that she had a remaining balance of $6,958.69 in payments to the unsecured creditors and $444.17 in administrative claims. *See* R. 107. In her Brief, however, the Trustee stated that, as of January 3, 2005, the debtor was no longer delinquent and that she had paid $3,707.27 to unsecured creditors. *See* R. 124 at 13.

had received only $2,995.49 at that time. It was the Trustee's position that the debtor had failed to comply with the statutory requirements of 11 U.S.C. § 1325(a)(4) and § 1328(b)(2) and should not receive a discharge.[3]

On December 16, 2004, the court held a hearing on the two motions and the objections thereto. Counsel for the debtor stated that, under the chapter 13 Plan, the unsecured creditors' pro rata share depended upon the amount of secured claims filed: The greater the secured claims, the less the payments to the unsecured creditors. This balance between the secured and unsecured payments met the best interests of creditors test, stated debtor's counsel, because it was based on the liquidation value of the debtor's estate. She insisted that the unsecured creditors should receive $1,019.41. Because they already had been paid $2,642.31, she stated, the debtor had overpaid the creditors and had completed her Plan.

The Trustee responded that the best interests of creditors test, under the debtor's Plan, stated that the minimum amount the unsecured creditors would receive was $9,601; however, that amount had not been paid to the unsecured creditors, she noted. The debtor did not file a post-confirmation modification motion to change the dollar amount, the Trustee asserted, and therefore due process and notice issues would arise if the unsecured creditors would get less than the Plan promised. To get her discharge, stated the Trustee, the debtor must complete the Plan or seek a hardship discharge. The court directed the parties to file briefs on the matters.

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[3] Those two provisions of the Bankruptcy Code contain similar terms:

> § 1325(a) . . . [T]he court shall confirm a plan if –
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> . . .
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> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.
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> § 1328(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if –
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> . . .
>
> (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less that the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date.

11 U.S.C. §§ 1325(a)(4), 1328(b)(2).

The debtor, in her brief, reported that unsecured non-priority claims in the total amount of $55,595.62 were filed. *See* R. 122 at 4. She accepted the Trustee's calculations that those claims were to be paid a 17.28% dividend, which was the proper pro rata share of $9,601. According to the Trustee's online records, the Trustee had paid $3,707.27 to those creditors as of December 18, 2004. The debtor also stated that the original Plan contained dollar values listed to the best of her knowledge. *See id*. It failed, however, to list the priority and secured claims added for payment in the Special Order. In her view, the Special Order "modified the dollar values contained in the 'best interests of creditors' analysis in debtor's Plan and thus modified the entire analysis." *Id*. at 5. That modification changed the distribution to unsecured creditors from $9,601.00 to $1,019.41. *Id*. She pointed out that the Plan states that general unsecured claims are to be paid "a pro rata dividend of funds received by the Trustee after payment of administrative expenses, priority and secured claims." *Id*. at 6. Therefore, the debtor insisted, "notice was given that the amount to be paid to general unsecured creditors was dependent upon the dollar value of priority and secured claims" and the unsecured creditors were actually entitled to a pro rata share of only $1,019.41. Because the Trustee already had paid $3,707.27 to general unsecured creditors, the debtor contended that she was entitled to a discharge under § 1328. *See id.* at 7.

In her reply brief, the debtor emphasized that her Plan and the modifications contained in the Special Order should be read in their entirety.

> There was no need for the Special Order to specifically state that the total paid to general unsecured creditors was decreased for the reason that such decrease is not a modification of the Plan provisions. The Plan states that general unsecured creditors receive a prorata share of funds received after payment of the secured and priority claims. Therefore, increasing the total paid to priority and secured claims decreases the total paid to general unsecured creditors.

R. 126 at 1.

The Trustee, in her brief, reiterated that the original or base Plan filed by the debtor on March 8, 1999, met the best interests of creditors test by promising to pay the unsecured creditors $9,601. *See* R. 124 at 5. The unsecured creditors received notice of the debtor's Plan and of their pro rata dividend. The Special Order increased the amounts to be paid to particular secured and priority claimants in the Plan but did not modify the

amounts to be paid to unsecured creditors. According to the Trustee, no reduction was made in the dividend to unsecured creditors "because the parties did not intend for a reduction." *Id.* at 8. No notice of a pre-confirmation modification in the unsecured creditors' share was given prior to the Special Order, and the debtor did not file a post-confirmation modification.[4] Because the debtor did not pay to unsecured creditors what the confirmed Plan required, $9,601, the Trustee asserted that the debtor was in material default pursuant to 11 U.S.C. § 1307(c)(6). She sought dismissal of the debtor's case.

Following the briefing period, the court took the motions under advisement on January 13, 2005.

Discussion

"As soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge of all debts provided for by the plan." 11 U.S.C. § 1328(a). A debtor is entitled to a discharge, however, only after the debtor fulfills all her obligations under her chapter 13 Plan. *See Pancurak v. Winnecour (In re Pancurak)*, 316 B.R. 173, 175 (Bankr. W.D. Pa. 2004). The debtor in this case insists that she has made all her Plan payments and therefore must be granted a discharge under § 1328(a). The Trustee asserts that the debtor is not eligible for a discharge because the amount actually distributed to the allowed unsecured claims was less than what was stated in the Plan as the amount that would have been paid on those claims if the debtor's estate had been liquidated under chapter 7. *See* § 1325(a)(4), § 1328(b)(2). Simply stated, it is the Trustee's view that the debtor may not receive a discharge until the unsecured creditors are paid $9,601, as stated by the Plan. It is the debtor's view that, after the Plan was modified by the court's Special Order of

[4] In her reply brief, the Trustee considered the debtor's lengthy quotation from a decision rendered by the Eighth Circuit Bankruptcy Appellate Panel in *Forbes v. Forbes (In re Forbes)*, 215 B.R. 183 (8th Cir. B.A.P. 1997). The *Forbes* passage stated that a plan should be read in its totality. "Although it may change with time, it is, in essence, that which it always was – the plan." *Id.* at 188. The Trustee was basically in agreement with that broad, functional concept of a plan. She also suggested that the decision supported the Trustee's position rather than the debtor's. The court finds that the quoted comment in *Forbes*, the only case cited by the debtor, states a general principle concerning chapter 13 plans and does not bolster the debtor's position in any significant way.

Confirmation, she was required to pay the unsecured creditors only $1,019.41 and that, having paid more than that sum, she is entitled to a discharge.

A confirmed chapter 13 plan "acts more or less like a court-approved contract or consent decree that binds both the debtor and all the creditors." *In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000). The Bankruptcy Code explicitly states that the "provisions of a confirmed plan bind the debtor and each creditor." § 1327(a). This debtor's Plan reiterated those obligations of the debtor and her creditors to one another:

> [P]ursuant to 11 U.S.C. § 1327(a), when confirmed, the provisions of this plan shall bind the debtor and each creditor of the debtor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has rejected, or has accepted this plan.

R. 124, Ex. A at 1 (Plan, Art. I, ¶ 2). The requirement of § 1327(a) imposes a finality on the confirmed plan. "As a general rule the failure to raise an objection at the confirmation hearing or to appeal from the order of confirmation should preclude . . . attack on the plan or any provision therein as illegal in a subsequent proceeding." *In re Chappell*, 984 F.2d 775, 782 (7th Cir.1993) (internal quotation marks, citations omitted).

In this case, all the creditors and parties to the Plan received the Plan and had the opportunity to object to its terms before confirmation. *See In re Harvey*, 213 F.3d at 322. When several secured and priority claimants objected, the court modified the original Plan to satisfy their objections. *See* R. 124, Ex. B. The Special Order increased the amounts to be paid to those claimants and extended the length of the Plan beyond 48 months to whenever "the Plan, as modified, is liquidated." However, it did not change the fixed amount the debtor must pay into the Plan, $731.25 each month, and did not modify the amount to be paid pro rata to unsecured creditors, $9,601. *Compare In re Golek*, 308 B.R. 332, 335 (Bankr. N.D. Ill. 2004) (reviewing similar plan with fixed monthly payments and an additional condition guaranteeing a minimum percentage to the unsecured creditors, directing the debtor to "continue making plan payments for an additional 24 months, or until the Trustee has received sufficient funds to pay 10% to allowed unsecured claimants, whichever occurs first"). The court confirmed the Plan as modified.

The amount to be paid to allowed unsecured claimants, once fixed by the order confirming the chapter 13 plan, can be changed only by an amendment of the plan. *See In re Rivera*, 177 B.R. 332, 335 (Bankr. C.D. Cal. 1995). A Chapter 13 plan may be modified after confirmation to increase or reduce the amount of payments to a class of creditors, *see* 11 U.S.C. § 1329(a), but this debtor did not file a § 1329 motion for modification of the Plan. Nor did she appeal the Special Order. The court finds therefore that the debtor, like the creditors, was bound to the terms of the confirmed Plan. *See In re White*, 126 B.R. 542, 547 (Bankr. N.D. Ill. 1991).

The Plan required the debtor to pay a $9,601 dividend pro rata to the unsecured creditors. The unsecured creditors had notice of that dividend and expected to receive their pro rata share of $9,601 after all other classes of creditors were paid. They were not provided any later notice that the dividend amount would change. *See In re Duggins*, 263 B.R. 233, 240-41 (Bankr. C.D. Ill. 2001) (finding that a lack of notice of a substitute value vitiated the due process protection built into the bankruptcy process). In the view of the court, the Plan statement that unsecured creditors are paid a pro rata dividend "after payment of administrative expenses, priority and secured claims" is not a notice that the unsecured creditors will get less than the $9,601 promised. In addition, the court finds that the debtor's successful completion of all monthly payments of $731.25 is not a completion of the plan as long as the required payments to unsecured creditors were not completed. When a chapter 13 plan states that the unsecured creditors will receive a fixed amount or percentage return, that provision must be honored. *See Roberts v. Boyajian (In re Roberts)*, 279 F.3d 91, 92-93 (1st Cir. 2002) (stating that "courts uniformly have held that a confirmed chapter 13 plan provision requiring a fixed percentage return to unsecured creditors takes precedence over a companion provision prescribing the aggregate payments to be made to the chapter 13 trustee").

The court also finds that the Special Order itself contemplated that the debtor was obliged to pay the $9,601 dividend, pro rata, to the unsecured creditors as the Plan provided. The Order modified the Chapter 13 Plan in two ways: Payments to secured and priority claimants increased and the time period for payments was extended "until the Plan, as modified, was liquidated." Because the Special Order lengthened the Plan and made

no change in the unsecured creditors' dividend amount, the court clearly intended that the pro rata portions of the fixed dividend amount would be paid to the unsecured creditors before the Plan, as modified, was liquidated or completed. The court finds that the debtor was not justified in thinking that her completion of the total monthly payments prescribed in the confirmed Plan relieved her of her responsibility to comply with the provision that she pay the dividend on allowed unsecured claims. *See id.* at 93. The court determines, therefore, that the debtor did not complete the payments of her confirmed chapter 13 Plan. *See In re Rivera*, 177 B.R. at 334-35.

The Trustee requests that the debtor's case should be dismissed because her failure to pay the unsecured creditors as provided under her Plan constituted a material default. Section 1307(c) provides that a bankruptcy court has the discretion to dismiss a chapter 13 case or to convert it to a chapter 7 case, "whichever is in the best interests of creditors and the estate, for cause." That section presents ten examples of circumstances that constitute "cause" for converting or dismissing a chapter 13 case, and one such example is a debtor's material default with respect to a term of a confirmed plan. *See* § 1307(c)(6).

The court finds that the debtor has materially defaulted in two respects. First, by not completing the dividend distributions to the unsecured creditors, the debtor has not completed her payments under the plan. *See In re Roberts*, 247 B.R. 592, 594 (Bankr. D.R.I. 2000) (granting trustee's motion to dismiss on ground that debtors did not pay unsecured creditors as confirmed plan required); *In re White*, 126 B.R. at 546-47 (finding that the debtors' failure to make sufficient payments to allow proper dividend distributions to the unsecured creditors constituted a material default warranting dismissal of the case). The court further finds that the debtor has exceeded the five-year limitation imposed under § 1322(c). *See In re White*, 126 B.R. at 547. The court determines, therefore, that the debtor's failure to complete the payments to the unsecured creditors and her extension of payments beyond the five-year limitation constitute material defaults of the Plan and warrant dismissal under § 1307(c)(6).

Conclusion

For the reasons stated above, the court denies the Motion for Discharge filed by the debtor Lynda Kay Starr and grants the Trustee's Motion to Dismiss filed by Debra L. Miller, Chapter 13 Trustee.

SO ORDERED.

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HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT